Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Promotion of Competitive Networks in Local Telecommunications	)	WT Docket No. 99-217
Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes And Assessments	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

JOINT REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, AND MONTGOMERY COUNTY, MARYLAND, AND TEXAS COALITION OF CITIES ON FRANCHISE UTILITY ISSUES

September 27, 1999

TABLE OF CONTENTS

SUMMARY

The ostensible purpose of the regulations proposed in the Notice of Proposed Rulemaking ("NPRM") in this docket would be to prevent utilities and private property owners from preventing telecommunications providers from gaining access to their properties. However, before the Commission can promulgate rules to remedy this perceived problem, it must first establish that the "problem" exists. To do otherwise could easily result in unnecessary and excessive regulation.

The comments submitted by the various CLECs, which rely heavily upon anonymous, unverifiable anecdotes, fail to establish the existence of unreasonable restrictions on access to such properties. In fact, competitive providers acknowledge that they are generally able to negotiate agreements for building access. Furthermore, competitive providers have provided no evidence that the terms of building access are unreasonable and indeed, many CLECs acknowledge they are willing to address such issues as insurance, indemnification, liability for damage to buildings and the like and that they are willing to compensate owners for access. Thus, there seems to be no issue here for the Commission to address. It cannot rely upon the general, unsupported rumors proffered by commenters such as ALTS, to conclude that there exists a problem in the market so marked and so troubling that the Commission must expand its jurisdiction to address it.

Congress did not write Section 224 to include facilities inside buildings. Given differences in state laws, creating a coherent set of generally applicable rules requiring access to such wiring would necessarily require the Commission to convert one form of state-law access right into another—something the Commission has no power to do.

Under Section 2(a), the Commission has jurisdiction over *communication* and *persons engaged in communication.* Thus, if a building owner is not engaged in the transmission of communications, but merely owns or controls property over which wiring used by other parties to transmit communications passes, then the building owner is not subject to the Commission's jurisdiction.

Furthermore, the Commission does not have jurisdiction over all wire as such, and the CLECs are incorrect to suggest that the Commission has jurisdiction over wire simply because it is an "instrumentality." There is no reading of Section 3(51) under which the real property to which wiring is attached can be considered an instrumentality, facility, apparatus or service. Therefore, the Commission must avoid the temptation to exceed its authority by expanding Section 224 beyond the limits intended by Congress.

The United States Supreme Court has upheld the rights of a property owner to exclude a telecommunications carrier from the owner's premises based on the central principle that "the right to exclude" is one of the "most essential" of all property rights. CLEC suggesting that the protection of a right to exclude is somehow diminished simply because an owner has previously invited a third party onto her property are incorrect. This right is in no way limited to "initial invasions."

Some commenters assert that nondiscriminatory access rules are somehow an exception to the general right to exclude a party, and that therefore the Commission could enact such nondiscriminatory rules without implicating the just compensation requirement of the Takings Clause. However, a mandatory access rule is no less a taking just because it can be avoided by not providing limited access to others or by not engaging in limited "use" activity oneself.

Some CLEC commenters argue that the proposals in the NPRM would not cause a taking under the balancing test set forth in the regulatory takings doctrine but fail to address the critical facts that a court will consider in determining whether or not the rules would effect a regulatory taking. It is extremely rash for the industry to claim that the Commission need not concern itself with whether the NPRM may cause a regulatory taking.

The Commission lacks the statutory authority to effect the taking that would result from its imposition of access rules on property owners. CLEC attempts to distinguish the precedent of *Bell Atlantic v. FCC,* that the Commission lacked authority to promulgate similar rules, by claiming that building owners could easily avoid the NPRM by not having any telecommunications carriers present on their property are simply ludicrous. To suggest that building owners could lease building space without telephone services is absurd.

Various commenters support the expansion of the current OTARD rules (1) to include common areas and restricted use areas; and (2) to include non-video services. As pointed out in our initial comments, neither proposal is lawful.

The Commission itself has acknowledged that Section 207 did not authorize it to force building owners to permit a tenant access to common areas and restricted use areas, areas over which the landlord retains control and is no reason to revisit that decision now.

Just as the Commission lacks authority to expand its current rules to require access to common areas and restricted use areas, so does the Commission lack authority to expand the scope of its rules to include non-video services. Section 704(a), amending 47 U.S.C. § 332(c), expressly *preserves* local governments' authority over telecommunications antennas, and thus prevents the Commission from adopting rules for telecommunications antennas similar to those it

adopted for video receive antennas. Therefore, the Commission cannot expand the scope of Section 207 to include non-video services.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Promotion of Competitive Networks in Local Telecommunications	)	WT Docket No. 99-217
Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes And Assessments	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

JOINT REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, MONTGOMERY COUNTY, MARYLAND, AND TEXAS COALITION OF CITIES ON FRANCHISE UTILITY ISSUES

September 27, 1999

INTRODUCTION

The Commission's Notice of Proposed Rulemaking ("NPRM") in this docket proposes to require all utilities governed by Section 224 and private property owners to make conduits and rights-of-way inside buildings available to competing telecommunications providers. The ostensible purpose of these regulations would be to prevent utilities and private property owners from preventing telecommunications providers from gaining access to such properties in order to provide service to tenants. However, the record before the Commission fails to establish the existence of unreasonable restrictions on access to such properties that would justify such drastic intervention in the marketplace in the manner proposed by the NPRM. The anecdotal evidence provided by the proponents of forced access fails to establish that property owners are preventing access to their property or that such regulation is warranted. In addition, the Commission has no power to promulgate such rules - rules which would authorize the physical occupation of the property of building owners by telecommunications providers without just compensation – and the arguments of the proponents of forced access to the contrary are both weak and misguided.

I. THE RECORD BEFORE THE COMMISSION FAILS TO ESTABLISH THE EXISTENCE OF UNREASONABLE RESTRICTIONS THAT WOULD JUSTIFY COMMISSION INTERVENTION.

As pointed out in our initial comments, the Commission cannot simply promulgate rules to remedy a perceived problem without first establishing that the "problem" exists. Doing so could easily result in unnecessary and excessive regulation.[1] Moreover, even if the existence of

---

[1] *See Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies*, Report and Order, 2 FCC Rcd. 143, para. 105 n.245 (1987) (quoting *Home Box Office, Inc.*, 567 F.2d at 36, quoting *City of Chicago v. FPC*, 458 F.2d 731,

a problem is demonstrated, both common sense and the rules of administrative procedure dictate that the Commission first establish the basis and nature of the problem before it can fashion reasonable and effective rules which will adequately remedy the problem.[2] To do otherwise, could lead an agency to regulate in the wrong way a problem that may exist.[3]

The proponents of forced access have established neither that there is a problem, nor that regulation is warranted. Anonymous, unsubstantiated allegations are insufficient, especially in the face of verifiable data and scientific analysis directly to the contrary.[4] The Commission must ignore unsubstantiated claims proffered as facts. It cannot, based on general unsupported rumors such as those proffered by ALTS and others, conclude that there exists a problem in the market so marked and so troubling that the Commission must expand its jurisdiction to address it.[5]

---

742 (D.C. Cir. 1971) ("regulations perfectly reasonable and appropriate in light of a given problem may be highly capricious if that problem does not exist")). *See also Amendment of the Commission's Rules in Cellular Service*, Fourth Report and Order, 4 FCC Rcd. 2542, para. 14 (1988) ("This Commission is under an obligation not to impose regulations where there is no factual basis or need") (citing *Home Box Office Inc.*, 567 F.2d at 35-36).

[2] It is a well established tenet of agency decision-making that a properly-supported factual background must be the foundation of any agency order. *See Home Box Office Inc.*, 567 F.2d at 35.

[3] *See Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies*, Report and Order, 2 FCC Rcd. 143, para. 105 n.245 (1987) (quoting *Home Box Office, Inc.*, 567 F.2d at 36, quoting *City of Chicago v. FPC*, 458 F.2d 731, 742 (D.C. Cir. 1971) ("regulations perfectly reasonable and appropriate in light of a given problem may be highly capricious if that problem does not exist")). *See also Amendment of the Commission's Rules in Cellular Service*, Fourth Report and Order, 4 FCC Rcd. 2542, para. 14 (1988) ("This Commission is under an obligation not to impose regulations where there is no factual basis or need") (citing *Home Box Office Inc.*, 567 F.2d at 35-36).

[4] *See* Initial Comments of Real Access Alliance.

[5] As the U.S. Court of Appeals for the District of Columbia has previously ruled, "comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response." *Home Box Office, Inc.*, 567 F.2d at 36.

A. The CLECs Have Proffered No Credible Evidence that a Problem Exists.

The comments submitted by the various CLECs rely heavily upon anonymous, unverifiable anecdotes. These comments do not contain a single verifiable example or any objective data: other than their anecdotes, the CLECs rely entirely on broad policy statements and vague, general, and unsubstantiated claims.[6] A careful examination of the CLECs' anecdotes, unsubstantiated claims and broad policy statements reveals just how unconvincing this information is.[7] Moreover, despite the unique status of municipal property owners, it is impossible to determine from the information provided whether any of these claims or anecdotes involve municipal property. The unique character of municipal property as described in our initial comments makes unnecessary Commission regulation an even more problematic proposition than for other private property.

In addition, the CLECs justify their use of anonymous accusations by claiming that they fear "retaliation" by property owners. This alleged fear of retaliation, unsupported in general, is specifically unwarranted as to municipal property owners, since municipalities obviously lack the multi-state presence to exercise such retaliation.

---

[6] "Other MTE owners and managers impose such unreasonable conditions and/or demand such high rates for access that providing competitive telecommunications services in those MTEs becomes an uneconomic enterprise." Fixed Wireless Communications Coalition Comments at 3.

[7] For a detailed discussion of these anecdotes and claims, *see* Reply Comments of Real Access Alliance at I.B.

B. The Evidence Presented does not Establish that Property Owners are Restricting Access or Imposing Unreasonable Restrictions Upon Access to their Property.

Competitive providers acknowledge that they are generally able to negotiate agreements for building access. None of the commenters claims that denial of access to buildings is actually a significant problem. In fact, they say exactly the opposite.[8]

There is also no evidence that the terms of building access are unreasonable. It is an established fact that property owners typically grant CLECs access, and that CLECs find the terms of access sufficiently reasonable to accept them. In fact, the comments of the CLECs make no serious attempt to describe or analyze the kinds of terms that they believe are unreasonable. The only complaint the CLECs have clearly expressed is that they believe some property owners charge too much. Property owners (including municipal property owners), however, must seek a reasonable return on their investment and also protect the present and future value of their buildings. Indeed, many CLECs acknowledge they are willing to address such issues as insurance, indemnification, liability for damage to buildings and the like and that they are willing to compensate owners for access. Thus, there seems to be no issue here for the Commission to address.

Competitive providers have presented no credible evidence that building owners have "bottleneck control" or "extract monopoly rents." Free and open competition have long been recognized as the principal and preferred means of regulating the Nation's economy.[9] Congress has only departed from this policy, by implementing economic regulations, when it has found that the market is not functioning. In passing the Telecommunications Act of 1996, Congress clearly expressed the view, also held by the Commission, that competition should replace

---

[8] AT&T at iii.

[9] *See* Comments of Real Access Alliance.

regulation in the telecommunications industry whenever possible.[10] CLECs have not shown why the Commission should depart from the free market model in the distribution of telecommunications services to multiple-tenant users.

II. THE PROPONENTS OF FORCED ACCESS FAIL TO EXPLAIN HOW SECTION 224 AUTHORIZES ACCESS TO FACILITIES INSIDE BUILDINGS.

A. Utilities Generally Do Not Own or Control Ducts or Conduits Inside Buildings, and the Term "Right-of-Way" Does Not Include Licenses or Leases.

Congress did not write Section 224 to include facilities inside buildings. The Commission must avoid the temptation to exceed its authority by expanding Section 224 beyond the limits intended by Congress.

One of the reasons the Commission must not regulate access rights inside buildings is that it is impossible to create a nationwide set of generally applicable rules given differences in state laws. As commenters have pointed out, various state courts have defined right-of-way differently. For example, the fact that some courts have defined a right-of-way as an easement while others describe a right-of-way as a license or contractual agreement illustrates that there is much variety in state laws, the terms of existing agreements, and conditions inside particular buildings. Any coherent set of generally applicable rules would necessarily require the Commission to convert one form of state-law access right into another—something the Commission has no power to do. Therefore, the Commission cannot adopt a rule that will give the CLECs what they want in every case.

---

[10] *See* Reply Comments of Real Access Alliance.

Finally, it is simply incorrect to speak of access rights inside buildings as rights-of-way. The concept of a right-of-way refers to transmission facilities outside buildings. We are aware of no case that supports the proposition that the term "right-of-way" includes the right to enter a building. Utilities neither own nor control ducts, conduits or "rights-of-way" inside buildings, thus, the question of ownership or control under Section 224 is irrelevant, and the Commission cannot use Section 224 to establish forced access regulation.

B. Any Commission Regulation that Expands an Access Right Would Alter the Property Rights of Building Owners and Utilities Under State Law and is Therefore Contrary to Section 601 Which Prevents the Commission from Modifying State Law.

The CLECs' creative construction of Section 224 seems to ignore Section 601(c)(1) of the 1996 Act, which states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." The argument by some CLECs that the Commission need not alter state property law to achieve their aims, because it would merely be defining the scope of "ownership or control" over rights of way for purposes of interpreting federal law,[11] is without merit. Ownership and control over property are inexorably intertwined with questions of both state contract law and state property law. Property is property, and the extent of property in any given instance is created and defined only by state law. The right to exclude persons from one's property under state law would mean nothing if the Commission could then require that a property owner permit providers access to the property under color of federal law.

The Commission cannot alter the terms of a grant of a state property right because it is not the source of the power that created the property rights in the first place. While a duly

---

[11] Winstar at 62; Teligent at 28.

authorized federal agency may take property rights created under state law upon payment of compensation, it cannot create new property rights in areas that are within the jurisdiction of the states. The Commission is subject to certain basic constraints under our federal system of government. One of these is the primacy of state law in defining property rights.

III. NOTHING IN THE COMMUNICATIONS ACT GIVES THE COMMISSION JURISDICTION OVER BUILDING OWNERS.

The CLECs reading of Section 2 of the Act and the related definitions at Section 3(33) and 3(51) is simply wrong. The Commission does not have jurisdiction over wire as such, and it is incorrect to say that the Commission has jurisdiction over wire simply because it is an "instrumentality." The Commission has no more jurisdiction over building owners or over wire they own or control than it has over contractors that lay fiber for the telecommunications providers.

Under Section 2(a), the Commission has jurisdiction over "all interstate and foreign communications by wire or radio . . . and to all persons engaged . . . in such communication . . . ." Thus, the Commission has jurisdiction over *communication* and *persons engaged in communication*. Unless they are engaged in the provision of services regulated under Title II or Title III, building owners are not persons engaged in communication. The mere ownership or control of premises on which telecommunications facilities are located does not mean that building owners are persons engaged in communication. To find otherwise would mean that every utility, railroad, and government entity that controls rights-of-way is a person engaged in communications.[12] Teligent misstates the facts and confuses the issue when it argues

[12] In fact, even persons who actually are engaged in the provision of communications are not necessarily subject to Commission jurisdiction. *See Pennsylvania R.R. v. P.U.C. of Ohio,* 298

that in setting terms for access to buildings building owners charge for the use of telephone lines or prohibit the use of those lines.[13] Building owners charge for the use of their property. They are in the business of making real estate available to a variety of different types of tenants. When a building owner requires a CLEC to enter into an agreement for access, it is charging for access to property; charging for the use of property is not at all the same thing as providing a communications service. Teligent's analysis would have the absurd result that a property owner who lets his property to a tenant would automatically be engaged in whatever business the tenant chose to engage in.

Section 2(a) also gives the Commission jurisdiction over "communication by wire." Section 3(51) of the Act defines communication by wire as the "*transmission* of writing, signs, signals, pictures and sounds of all kinds *by aid of* wire, cable, or other like connection . . . including all instrumentality's . . . incidental to such transmission." The key term in this definition is "transmission." The clause beginning with "instrumentalities" clarifies that the method of transmission, which is "by aid of" a wire or other physical connection between the points of origin and reception, may include equipment other than just the wire connection. However, it does not mean that the property containing the wire itself is subject to the Commission's jurisdiction. Rather, it is the transmission that the Commission may regulate, and this reference to "instrumentalities" is not intended to bring all the physical components of the connection directly under the Commission's jurisdiction, no matter who owns or uses them There is no reading of Section 3(51) under which the real property to which wiring is attached

---

U.S. 170 (1936) (predecessor of Title II was "aimed at common carriers exclusively . . ., and not even all these.").

[13] Teligent at 50.

can be considered an instrumentality, facility, apparatus or service. Therefore, the Commission cannot direct building owners to admit any telecommunications provider that requests access.

The Commission has jurisdiction over communication, which means the act of transmission. If a building owner is not engaged in the transmission of communications, but merely owns or controls wiring that other parties use to transmit communications, then the building owner is not subject to the Commission's jurisdiction. [14]

Finally, the Commission has no ancillary jurisdiction where it has no jurisdiction under Section 2(a). Section 4(i) and Section 303(r) serve only to give the Commission authority in areas necessary to implement the express authority.

IV. FORCED ACCESS RULES, SUCH AS THOSE PROPOSED BY THE NPRM, WOULD EFFECT A TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT.

A. Nondiscriminatory Forced Access Rules Constitute A Taking Under The Fifth Amendment

In 1986 the United States Supreme Court upheld the rights of a property owner to exclude a telecommunications carrier from the owner's premises based on the central principle that "the right to exclude" is one of the "most essential" of all property rights.[15] This essential right protects a MTE building owner from having to acquiesce to the uninvited presence of a telecommunications carrier on its property unless the owner receives constitutionally-adequate just compensation.

---

[14] The Commission's authority over wiring has historically arisen out of its authority over the carriers that owned and controlled the wiring.

[15] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

Some CLECs seem to claim that *Loretto*'s protection of a property owner's right to exclude others from her property is somehow diminished by the fact that the owner had previously invited a third party onto her property.[16] This claim is not persuasive.[17] The *Loretto* decision does not in any way limit itself to "initial" invasions, nor does it emphasize, focus on, or even mention whether the physical occupation in that case was "initial."[18] The NPRM requested comment on proposals that would authorize third parties to occupy facilities on the property of MTE building owners against the will of the building owner. These proposals fall squarely within the definition of a *per se* taking under *Loretto*, no matter how hard CLEC commenters try to redefine them as mere regulation of the landlord-tenant relationship.

Many CLEC commenters acknowledge that *Loretto* would require that a number of proposals in the NPRM be characterized as takings of property within the meaning of the Fifth Amendment.[19] Yet they suggest that even if there is a taking, there is no Takings Clause problem because building owners are being compensated by their existing tenants. However, there is no basis, either in reason or in law, for the notion that the revenues a property owner is already receiving according to previously negotiated agreements, unaffected by the regulation at issue, can somehow constitute "just compensation" for an additional taking effected by that regulation. The constitutional requirement of "just compensation" for a taking of property refers

---

[16] Teligent at 55; Winstar at 40.

[17] This argument should be dismissed because its inappropriately based on cases which do not address a property owner's right to exclude uninvited parties from her property.

[18] Indeed, the Supreme Court has dismissed the argument that the landlord could avoid the government authorized invasion by not inviting any tenants into the building: this argument, the Court held, proves way too much, as it would condition use of the building on abandoning the essential right to exclude other, uninvited parties.

[19] Teligent at 67; Winstar at 45.

to the payment of an award that compensates the property owner for the property that was taken, not to prior economic benefits unrelated to the taking.

The CLECs advise the Commission not defer to state property law.[20] The Commission should disregard this advice. Such a regulatory approach would be contrary to the fundamental principles of the Takings Clause which protects property rights as they are understood to exist under relevant state and local property law, not as a federal regulator conceives to be appropriate in light of federally-mandated public policy goals.

B. There Is No Exception To The Holding Of *Loretto* For Nondiscriminatory Access Rules And Thus No Legal Basis For The Commission To Adopt Such Rules.

Some commenters assert that there is an exception to the holding of *Loretto* for nondiscriminatory access rules, and claim that the Commission could enact such nondiscriminatory rules without implicating the just compensation requirement of the Takings Clause.[21] A mandatory access rule, however, is no less a taking because it can be avoided by not providing limited access to others or by not engaging in limited "use" activity oneself. A federal taking that authorizes unlimited numbers of private parties to enter and perform their own takings is more, not less, opprobrious than a seizure by the Commission alone.

The CLEC commenters have not submitted any rationale for evading the straightforward conclusion that the forced access rules proposed in the NPRM would constitute *per se* takings. *Loretto* leaves no room for anything but the unambiguous conclusion that an MTE building

---

[20] Teligent at 28; Winstar at 62; AT&T at 19

[21] Teligent at 54.

owner has a constitutional right to exclude a telecommunications carrier from her premises unless it is clear under local law that she has ceded that right to that carrier.

C. The CLEC Commenters Ignore The Fact That The Property Rights Of MTE Building Owners Are Also Protected By The Regulatory Takings Doctrine

After dismissing or simply ignoring the *per se* takings doctrine, the CLEC commenters further argue that the proposals in the NPRM would not cause a taking under the balancing test set forth in the regulatory takings doctrine. Given the complicated judicial balancing test involved, however, it is extremely rash for the industry to clam that the Commission need not concern itself with whether or not the NPRM may cause a regulatory taking.

Indeed, the CLEC commenters fail to address the critical facts that a court will consider in determining whether or not the Commission has promulgated a rule that constitutes a regulatory taking. These commenters ignore the fact that the "economic impact" on MTE building owners may in many instances be very significant, and that many MTE building owners will have "investment backed expectations" as to their ability to earn revenues related to the use of these provisions by providers of telecommunications services.[22]

D. The Commission Lacks The Statutory Authority To Effectuate The Taking That Would Result From Its Imposition Of Access Rules

The Commission lacks the statutory authority to effect the taking that would result from its imposition of access rules on property owners. The D.C. Circuit court's ruling in *Bell Atlantic Telephone Companies v. FCC Bell Atlantic,* 24 F.3d 1441, 1445 (D.C. Cir. 1994), is

directly on point to whether the Commission has authority to take the property of MTE building owners. The court in *Bell Atlantic* held that the Commission lacked authority to order physical collocation between competitive access providers and ILECs because this form of collocation "would seem necessarily to 'take' property regardless of the public interests served in a particular case."[23]

The CLECs attempt to distinguish *Bell Atlantic* by claiming that while the ILECs in *Bell Atlantic* had practically no choice but to allow the physical collocation, MTE building owners could easily avoid the NPRM by not having any telecommunications carriers present on their property.[24] This suggestion is simply ludicrous. To suggest that building owners could lease building space without telephone services is absurd. The assertion that this somehow gives the Commission the authority to effect a taking compounds this absurdity. The Commission cannot disregard the D.C. Circuit's decision in *Bell Atlantic* as either "erroneous"[25] — a bold charge that is never explained — nor to avoid the force of that decision by viewing it as an "anomaly"[26] or as "inapplicable."[27]

The court's opinion applied the well established "avoidance canon" to a statutory construction case that was, in fact, much stronger than would be the case if the Commission were to enact the forced access rules envisaged by the NPRM. A court would *a fortiori* reach exactly

---

[22] Winstar at 42; Teligent at 60.

[23] *Bell Atlantic,* 24 F.3d at 1445 (internal citations omitted).

[24] Teligent at 66.

[25] Teligent at 74.

[26] Teligent at 71.

[27] Winstar at 44.

the same result in judging whether the Commission currently has statutory authority to take the property of building owners.

V. EXTENDING THE OTARD RULES IN ANY WAY WOULD BE AN EXERCISE IN CONTINUED UNLAWFUL REGULATION.

Various commenters support the expansion of the current OTARD rules (1) to include common areas and restricted use areas; and (2) to include non-video services. As pointed out in our initial comments, neither proposal is lawful.

A. The Commission Has Already Recognized That it Has No Power to Force Property Owners to Allow the Installation of Antennas in Common Areas and Limited Use Areas.

In its *Implementation of Section 207 of the Telecommunications Act of 1996 - Restrictions on Over-the-Air Reception Devices*, Second Report and Order, 13 FCC Rcd. 23874 (1998), the Commission acknowledged that Section 207 did not authorize it to force building owners to permit a tenant access to common areas and limited use areas, areas over which the landlord retains control. The contrary arguments of commenters such as Winstar and PCIA do nothing to support their claim that the Commission's prior finding was erroneous or to demonstrate that anything has changed since the Commission's original decision. Thus, there is no reason to revisit that decision now. Furthermore, for the Commission to reverse itself on this point would create further havoc and violate the Fifth Amendment, as the Commission itself has acknowledged. Second Report and Order at ¶40.

B. The Commission Still Has No Authority To Permit The Installation Of Antennas On Leased Property.

Far from having authority to extend its current rules, the Commission had no authority to permit the installation of antennas on leased property because the purpose of Section 207 was only to allow property owners, and not renters, to install antennas otherwise banned by zoning rules. Congress never intended to create new rights against property owners. The Commission's rules are particularly troublesome because they create incentives for tenants to damage property they do not own, and make it difficult for property owners to recover their costs or protect themselves against liability. The consequences of this decision are only now becoming apparent.

C. The Commission has No Authority to Expand the Scope of Section 207 to Include Non-video Services.

Just as the Commission lacks authority to expand its current rules to require access to common areas and limited use areas, so does the Commission lack authority to expand the scope of its rules to include non-video services. The Commission simply cannot extend to telecommunications facilities (transmit/receive antennas) the drastic preemption it has applied to video receive antennas.[28] To do so would be directly contrary to the Commission's congressional mandate.

As pointed out in our initial comments, Section 207, upon which the Commission premised its broad preemption of local rules, is confined to "devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services." Section 704(a), amending 47 U.S.C. § 332(c), expressly preserves local governments' authority over telecommunications antennas: with four exceptions specified in the statute, "nothing in this Act shall limit or affect the authority of a State or local

government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." This provision clearly evinces Congress' intent to *preserve* local authority over such facilities and prevents the Commission from adopting rules for telecommunications antennas similar to those it adopted for video receive antennas. Thus, the Commission cannot expand the scope of Section 207 to include non-video services.

Commenters simply ignore this limitation on the Commission's authority to preempt local government and/or property owner rules regulating telecommunications antennas. However, in light of this clear reservation of local authority over telecommunications antennas, commenters' strained attempts to find implied Commission authority to expand these rules in Section 2(a) and in the Commission's ancillary jurisdiction are without merit.[29]

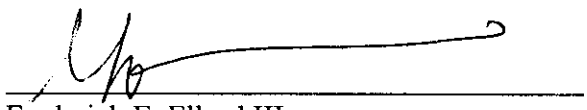
[28] NPRM at ¶ 69.

[29] As explained above the Commission has no ancillary jurisdiction where it has no jurisdiction under Section 2(a). Section 4(i) and Section 303(r) serve only to give the Commission authority in areas necessary to implement the express authority.

CONCLUSION

For the foregoing reasons, the Commission should not require forced access to local government property by telecommunications providers.

Respectfully submitted,



Frederick E. Ellrod III
Marci L. Frischkorn
Miller & Van Eaton, P.L.L.C.
Suite 1000
1155 Connecticut Avenue, N.W.
Washington, D.C. 20036-4306
(202) 785-0600

Counsel for the National Association Of Counties, the National Association Of Telecommunications Officers And Advisors, and Montgomery County, Maryland Texas Coalition of Cities on Franchise Utility Issues

September 27, 1999